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No. 87-454

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

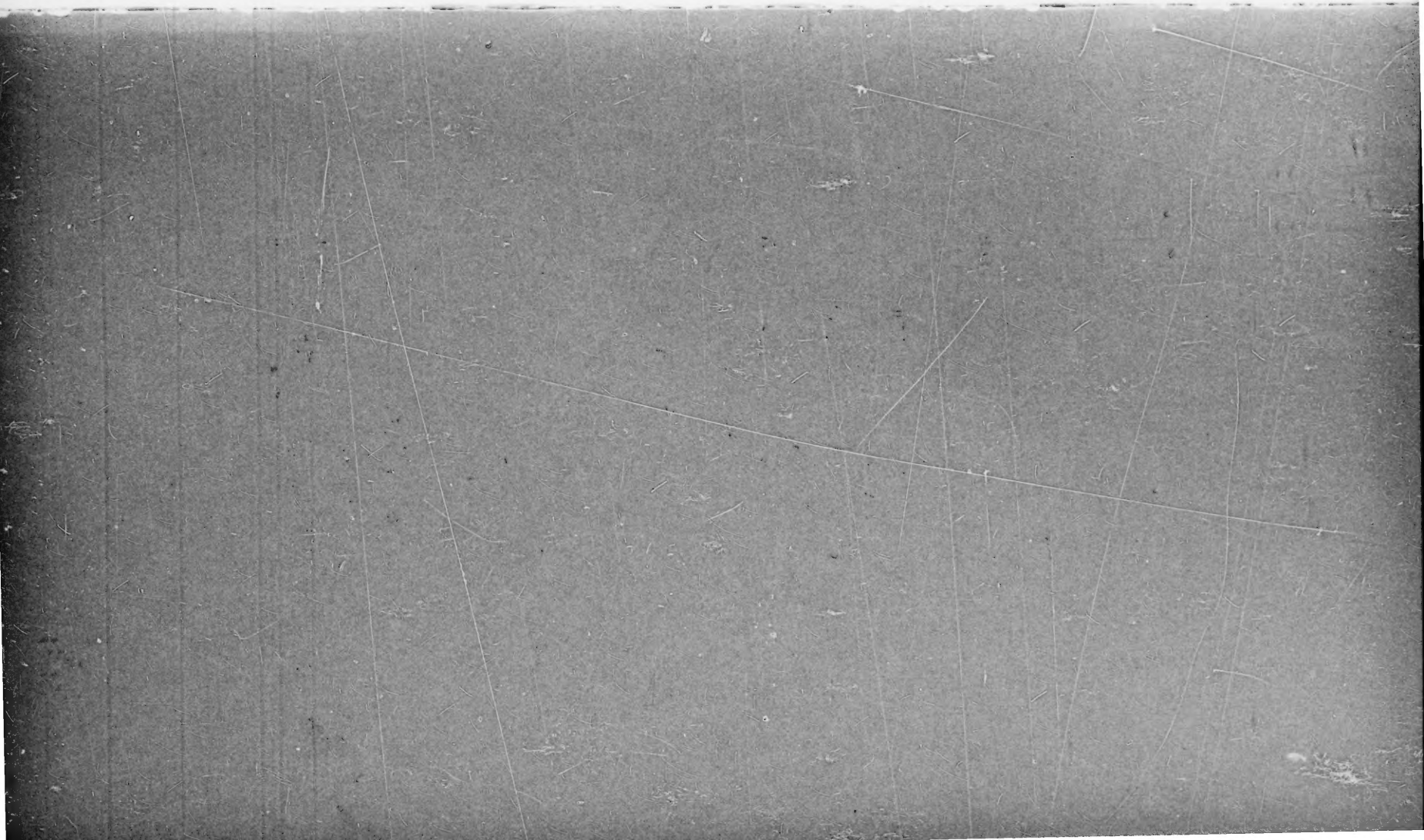
THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS,
Petitioners,

vs.

CHARLES V. MEADOWS and GEORGE HARRIS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E.O.C. ORD
ORD & NORMAN
Suite 1313
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 434-2444
Attorneys for Cross-Petitioners



QUESTION PRESENTED

1. Have the petitioners raised any issue in their questions presented which would require the issuance of a writ of certiorari, in particular, items number 2 through number 5?

2. Has the separate entity defense raised in item 3 of their questions presented been waived by the petitioners' failure to petition the decision that the issue was not timely raised?

3. Did the lower courts act properly when they first determined jurisdiction under FSIA's direct effect in the United States test, and then examined the minimum contacts due-process requirement of the U.S. Constitution?

LIST OF PARTIES

Plaintiffs-Respondents are Charles V. Meadows and George Harris, both individual U.S. citizens. Mr. Meadows is now deceased. Defendants-Petitioners are a foreign state, the Dominican Republic, and its agency, the Instituto de Auxilios y Viviendas.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported in Meadows v. Dominican

Republic, 817 F.2d 517 (9th Cir. 1987). It is contained in the Appendix at 1. The Ninth Circuit's Order denying defendants' Petition for Rehearing and Suggestion of Rehearing En Banc is unreported. It is in Petitioners' Appendix at 73.

The decision of the District Court giving rise to the instant proceedings is reported in Meadows v. Dominican Republic, 628 F.Supp. 599 (N.D.Cal. 1986) It is in Petitioners' Appendix at 29. The District Court's Order denying defendant's Motion for Reconsideration (February 25, 1986) is unreported and in the Petitioners' Appendix at 72.

JURISDICTION

Petitioners filed a Petition for Writ of Certiorari on September 18, 1987 (Docket No. 87-454). Both Petitioners'

and Respondents' Petitions arise from the same controversy and same case decisions.

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 14, 1987 affirming the decision of the United States District Court for the Northern District of California, dated February 5, 1986. Petitioners' Petition for Rehearing and Suggestion of Rehearing En Banc was denied on July 30, 1987.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves Articles I, II and III of the Constitution of the United States; the due process clause of the Fifth Amendment; 28 U.S.C. § 1330; the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 et seq., and Rules 12(b),

(h), 55(c) and 60(b) of the Federal Rules of Civil Procedure. These provisions are set forth in the Petitioners' Appendix at 75-111.

STATEMENT OF THE CASE

The defendants are a foreign state, the Dominican Republic (hereinafter "D.R.") and its agency, the Instituto De Auxilios Y Viviendas (hereinafter "Meadows") and George Harris (hereinafter "Harris"), both U.S. citizens. Charles Meadows was diagnosed as a victim of cancer in 1983 and is now deceased.

Plaintiffs' Prelitigation Dealings With The Defendants

The following facts are taken from the Declaration of Charles Meadows, filed December 11, 1981. (ER 381 CR 21) Meadows had engaged in international trade for over 20 years and made numerous business trips to the D.R. prior to

filing suit. In August of 1976, he learned that the Instituto had been trying without success to obtain a loan of 12 million dollars.

Meadows wrote to Dr. Mario A. Fernandez Mena (hereinafter "Mena"), whom Meadows understood to be the Dominican Republic's Secretary of State and General Administrator of the Instituto, and offered to locate a lender if repayment would be guaranteed by the Banco de Reservas, the Central Bank. Co-plaintiff Harris had previously informed Meadows that the guarantee would be a necessary condition before the loan could be funded through his banking contacts in London.

Mena phoned Meadows in California almost immediately, requesting urgently that Meadows locate a lender. After numerous phone conversations, during which Mena disclosed that the D.R.'s

president had given top priority to the project, Mena asked Meadows to locate the funding and agreed that a commission of two percent would be paid to Meadows if he was successful.

Consequently, Harris and Meadows contacted a lender agent in London. On September 6, 1976, after Meadows informed Mena of the preliminary general terms and conditions for the loan, Mena issued a mandate to Harris and Meadows for the loan application. (ER 371-76 CR 21) The mandate was recorded in the United States consulate's office in the D.R. and copies were received by Harris and Meadows. The loan was eventually funded by Citibank, an American bank, through Nassau and its branch in Santo Domingo.

In a phone conversation in February, 1977, Mena thanked Meadows for arranging the funding of the loan, and stated that

the loan proceeds had arrived satisfactorily. Mena acknowledged that Meadows' commission of $240,000 was due and owing, and promised to take care of it shortly.

Harris thereafter called Mr. Collins, an officer of the Citibank in Nassau, Bahamas, who acknowledged that he was aware of the commission owed and stated that it was in a floating account in New York. Collins promised that he would call New York and find out exactly where the money was located. Two weeks later, Collins called Harris to inform him that his superiors did not want him to give out any information on the loan and that if he did so, he would be transferred to the Venezuela office, apparently, not a desirable post. Collins then recommended that Harris talk to Pete Culbertson, manager of Citibank, Santo Domingo.

Meadows phoned Culbertson but he was not available. Meadows then spoke to Culbertson's assistant, Antonio Alma. Alma stated that he did not know where the commission was located but would investigate and call back. He further advised that the final loan agreements between Citibank and the D.R. had been prepared at his Bank prior to the meeting in Nassau wherein the funds were turned over. Alma stated that the President of the D.R.'s Central Bank, the Banco de Reservas, Mena, and himself, all traveled to Nassau to assist in consummating the loan. Alma never called back as promised.

Meadows phoned Culbertson again the next day but was told that Culbertson was out of the office. Finally, by using a fictitious calling name, Meadows got Culbertson on the phone. Upon learning

Meadows' identity, Culbertson stated that Meadows was to leave him alone and hung up. Meadows then called Alma who stated that he was unable to give any further information for fear of losing his job.

During a subsequent trip to Santo Domingo, Meadows brought up the lost commission with the President of the D.R., He immediately summoned his secretary and dictated a letter to Petit regarding the matter. Two days later, Meadows received a call from the President's office asking if he would be willing to accept the commission payable in Dominican pesos. Meadows stated that he would be willing to accept payment in that currency. The next day Meadows returned to Banco de Reservas for payment but was informed that Petit and the President would be away for about two

weeks. There was no authorization at the bank to pay Meadows.

Meadows went to Mena's office, who was not in. Mena's secretary informed Meadows that he would never see the commission. The files showed that it had already been spent. She informed Meadows that $180,000 had been paid to cover late interest charges from a previous loan from Citibank and someone else had been authorized to withdraw the remaining balance of $60,000. Neither Meadows nor Harris ever received a penny of their commission.

Meadows later received an official letter from Mena stating that the $12,000,000 loan had been consummated satisfactorily in Nassau and that the D.R. government wanted him to assist in securing another loan of $20,000,000 on behalf of the Instituto. (ER 378-79 CR

21) Meadows phoned Mena to complain about the commission owed. Mena reaffirmed that it was owed to Meadows and suggested that Meadows might get a larger commission on the $20,000,000 loan if it went through. Meadows, however, insisted he be paid for the prior loan.

The Plaintiffs' Litigation Efforts In The D.R.

The following facts are taken from the second affidavit of Charles Meadows. (ER 424 CR 31) In 1980, Meadows visited a law firm in the D.R. He discussed with several D.R. lawyers his problems in collecting the commission. He was told that no attorney in the D.R. would be willing to handle the case for fear of political repercussions. Later, Meadows called a friend who worked for the D.R. government and was told that it would not be in Meadow's "best interest" to return

to the D.R. due to the controversy concerning the commission.

In the fall of 1980, plaintiffs' current counsel, E.O.C. Ord, traveled to the D.R. and spoke personally with an attorney at the Instituto. (ER 577 CR 68) The attorney stated, without explanation, that the commission would not be paid and refused to provide any facts which would discredit Meadows' and Harris' claim to the commission.

The Plaintiffs' Efforts Through This Suit

Meadows and Harris filed suit on December 29, 1980 against the D.R. and the Instituto for breach of agreements. On February 11, 1981, the Clerk of the District Court witnessed mailing of a summons and complaint (and translations thereof) and a cover letter requesting service of these items upon the D.R.

These same witnessed items were sent by certified mail with return receipt requested to Mena. The mailing receipt was never returned.

On April 28, 1981, the Clerk of the District court witnessed a second mailing of the summons, and related materials, including a copy of the Foreign Sovereign Immunities Act ("FSIA"), to the Head of the Ministry of Foreign Affairs of the D.R. and a separate mailing to the Administrator General of the Instituto. (CR 8) The mailing receipts were never returned.

On June 17, 1981, the Clerk of the District Court witnessed the mailing of a letter to the State Department requesting service of the summons, complaint and notice of suit (and translations thereof) upon the D.R. (CR 13) On October 1, 1981, the Clerk of the District Court

received a letter from the United States Department of State (CR 15) That letter informed the Court that the DR had been served on September 10, 1981, with the summons, complaint, notice of suit, and copies of the FSIA as requested.

The U.S. Embassy's note of transmittal, served upon the defendants with plaintiffs' notice of suit, summons, complaint, and copy of the FSIA stated:

> Under applicable United States law a defendant in a lawsuit must file an answer to the complaint or some other responsive pleading within sixty days form the date of service of the complaint (i.e., the date of this note) or face the possibility of having judgment entered against it without the opportunity of presenting evidence or arguments in its behalf. Accordingly, the embassy requests that the enclosed nonresident citation and plaintiff's first amendment original petition be forwarded to the appropriate authority of the Government of the Dominican Republic with a view towards taking whatever steps are necessary to avoid a default judgment.

> ... Under the laws of the United States, any jurisdictional or other immunity must be addressed to the Court before which the matter is pending, for which reason it is advisable to consult an attorney in the United States.
>
> ... The notice of suit includes a copy of pertinent United States laws concerning sovereign immunities. For your information, we are enclosing a copy of the text of the Secretary of State's Circular Diplomatic Note of December 10, 1976 alerting foreign missions in Washington to the substance of the Act and its implementation and impact.

(CR 15,60, Ex. A therein. Emphasis added)

The Circular which was attached to the notice of transmittal delivered to the defendants stated in part:

> In addition to questions of state immunity, the new legislation will also prescribe the jurisdiction of Federal courts in the United States over foreign states and their agencies and instrumentalities ...
>
> The new statute precludes the Department of State from making decisions on state immunity. Such decisions must be made exclusively by the courts. Thus, when the legislation takes effect on January 29, 1977, the Department will not be

> able to continue its prior practice of entertaining diplomatic requests to determine questions of sovereign immunity, or of conveying such determinations of immunity to an American Court. ...

(State Dept. File No. P77 0014-208. 1976 Digest of U.S. Practice in Intern. Law 327-328. Emphasis added.) The defendants, however, did not respond.

Default was entered by the Clerk against the defendants on November 16, 1981. (CR 16,17) The plaintiffs then moved for entrance of a default judgment. (CR 19,21,30) Plaintiffs established their right to relief as required by 28 U.S.C. §1608 (3) before the default judgment was entered. (ER 381,424 CR 21, 30) Plaintiffs' motion and supporting documents were mailed to the defendants at the same two separate addresses. (See Certificate of Mailing, CR 21)

The Jurisdictional Proceedings

On April 6, 1982, the District Court, on its own motion, dismissed the plaintiffs' complaint. (CR 22,23) The Order stated that the plaintiffs failed to plead sufficient facts to establish the traditional state diversity of citizenship minimum contacts for personal jurisdiction. (CR 22) On May 26, 1982, the Ninth Circuit Court denied the plaintiffs' motion for reconsideration. (CR 26,27,32)

On August 11, 1982, plaintiffs appealed to the Ninth Circuit Court of Appeals. (CR 37) On January 17, 1984, that court remanded the case to the District Court to permit plaintiffs "to file an amended complaint or to secure the entry of a final judgment." (CR 40) All briefs were mailed to the petitioners at their two separate addresses.

On remand, the District Court did not disagree and entered a second default judgment against defendants on June 1, 1984. (CR 48,50) Plaintiffs' Memorandum in Support of Interest, the proposed judgment, a letter to the District Court regarding interest, and the Court's direction to file a proposed judgment, were all mailed to the defendants on May 24, 1984. (CR 49)

Serving the Default Judgment

The default judgment signed by the District Court was mailed to plaintiffs' counsel's former address and returned to the court. After plaintiffs' receipt of the judgment, a copy was sent by registered mail return receipt requested to the defendants on September 4, 1984. Through an oversight, an unsigned copy of the judgment was enclosed. Also enclosed, however, was a conformed copy via

a translation of the judgment into Spanish, indicating that the judgment was signed by the Court and a cover letter stating that a file stamped copy of the judgment was enclosed. Defendants have admitted that the September 4th mailing was received. (CR 60 at para.8)

On February 15, 1985, a copy of the signed default judgment and a Notice of Default (and translations thereof) were once again mailed to the defendants, registered mail, return receipt requested. On March 8, 1985, pursuant to the plaintiffs request to the Department of State, the U.S. Embassy served the default judgment on the D.R. On April 2, 1985, the Instituto, for the first time ever, returned a mailing receipt (from the February 15, 1985 mailing).

On April 10, 1985, the defendants, purporting to make a special appearance

through a single counsel, moved to vacate entry of the default. The defendants admitted having received the U.S. Embassy's original transmittal of the complaint but offered the opinion of Fabiola Medina Garnes (hereinafter "Garnes"), the current Assistant to the Legal Counsel to the President of the D.R., that the defendants did not respond to the service on the advice of Pedro Padilla Tonos, the Undersecretary and Acting Secretary of Foreign Affairs at the time of the U.S. Embassy's service. (CR 60 para.4) Garnes stated that she had reviewed <u>all</u> the files of the various parties on the matter. (CR 60, para.2) Despite the fact that Tonos was professor of international law and was a delegate to the United Nations in the U.S. during the time the FSIA was being considered in Congress (Exhibit A herein. CR 72,

Declaration of Miles Davidson), Garnes speculated that Tonos was unaware of the FSIA. (CR 60, para.4)

The defendants offered a governmental memorandum allegedly written by Tonos on December 5, 1981. The defendants' copy does not show a signature and there was no statement by Tonos verifying the document's authenticity. The memo stated in part:

> "We are hereby sending you a copy of Note No. 92 and its enclosures, dated September 8, 1981, from the Embassy of the United States of America, ...That was returned to the Embassy of that country together with its accomplished enclosures.
>
> The devolution of the above mentioned documents was made by the chancellorship in order to avoid any implied approval either of the terms of the Note nor if its enclosures based on the principle of immunities of the jurisdiction of the State of the Public International Law.
>
> In complying with the empowering of this Secretariat of States to the Attorney General's Office of the Republic, it has been taken into

> account the duly procedure to that competent jurisdiction. At the same time, this case has been informed to the President of the Republic, Mr. Antonio Guzman."

(CR 60, Exhibit therein. Emphasis added)

The U.S. State Department, in a letter to plaintiffs' counsel dated July 3, 1985, however, provided contradictory and additional facts:

> "The Secretariat of State for Foreign Relation replied via diplomatic on November 2, 1981 to our September 8 diplomatic transmittal note. In its note the Dominican Government sought to claim jurisdictional immunity as a foreign state. Though the note stated that the documents served with the September 8 note were being returned, the Embassy reported that they did not accompany the diplomatic note."
>
> "In response to the November 2 note, the American Embassy in Santo Domingo consulted with the Secretariat of Foreign Relations on November 25, 1981 for the purpose of emphasizing the importance of addressing the Dominican Republican's response to the lawsuit to the U.S. District Court rather than the Department of State."

(ER 149-50 CR 72, Item 3 therein)

In their reply papers, defendants' explanation changed. They offered a declaration of Tonos declining responsibility for the decision not to respond to the suit. (ER 269 CR 71, Appendix D therein) Defendants then offered an anonymous unauthenticated memorandum purporting to convey an opinion of the Advisory/Consulting Commission that "it [the D.R.] should not appear nor be represented..." (ER 271 CR 71, Appendix C therein) The opinion and legal reasoning were nowhere provided.

On February 5, 1986 the District Court denied the defendants' motion for Rule 60(b) relief. (App.29) At the hearing, for the first time, plaintiffs raised the issue of a separate entity. The District Court ruled that it was too late to raise the issue and instructed plaintiffs not to provide anything

further on the matter. Meadows, 628 F.Supp. at 608. (App.63) After the District Court denied the defendants' motion for reconsideration on February 25, 1986, (App.72), defendants appealed to the Ninth Circuit Court of Appeals on March 4, 1986. Plaintiffs cross-appealed on March 19, 1986. On May 14, 1987, the Ninth Circuit affirmed the lower court decision. (App.1) Defendants' subsequent motion for rehearing and suggestion of rehearing en banc was also denied on July 30, 1987. (App.73)

INTRODUCTION

Respondents will reply to the Petitioners' Brief (hereinafter "PB") in the order of the issues presented therein.

Petitioners' grounds for seeking a Writ of Certiorari are vague. We think Petitioners are alleging a conflict between the Circuits or that this

decision is at variance with decisions of this Court. However, a review of the case law establishes that there are no conflicts warranting this court's attention and that the case was correctly decided below.

ARGUMENTS

I. PETITIONERS' BRIEF MISSTATES THE TRUE FACTS OF THIS CASE, INTENTIONALLY OMITS MATERIAL ELEMENTS PREJUDICIAL TO THEIR POSITION, AND MECHANICALLY RECITES ARGUMENTS ALREADY DECIDED IN RESPONDENTS' FAVOR (P.B. 5-9)

PB p.6 states: "It is undisputed .. that the Dominican Republic took no part in any of the transactions underlying the cause of action." This is not correct. It is an unchallenged fact in the record that several years prior to the filing of the suit Meadows met with the President of the D.R. who acknowledged the debt on behalf of the D.R. and promised to have Central Bank pay Meadows. The Central

Bank, in fact, originally guaranteed the loan.

Petitioners first raised the issue of separate juridical entities at the hearing to set aside the default judgment only after Meadows was dying of cancer and not mentally competent to provide additional facts and evidence on this issue including estoppel. Further, the record below includes evidence that the undersigned counsel met with the lawyer for the Instituto prior to the filing of the FSIA suit to explain the said suit. At that time, the Instituto did not even mention the issue of its juridical separateness from the government of the D.R.

PB p. 6 states: "Due to inadvertent misinterpretation of United States law by officials in the Dominican Republic, defendants did not respond to the Complaint." This also is incorrect. The

State Department disclosed facts directly on point on this issue to the District Court. This disclosure indicated that the U.S. Embassy had advised the Petitioners, both in writing and orally, that the complaint must be answered. On September 8, 1981, along with the service of summons, complaint and notice of complaint, the United States Department of State included a letter of transmittal. This transmittal from the State Department is clear as to the effect of the D.R.'s failure to respond. The letter emphasized that D.R. must "file an answer to the complaint... or face the possibility of having a judgment entered against it." (CR 15,60, exhibit therein. Emphasis added.)

Furthermore, in a letter dated July 3, 1985, the State Department indicated:

> The Secretariat of State for Foreign Relation replied via diplomatic on November 2, 1981 to our September 8 diplomatic transmittal note. [Which included service of process] In its note the Dominican Government sought to claim jurisdictional immunity as a foreign state. Though the note stated that the documents served with the September 8 note were being returned, the Embassy reported that they did not accompany the diplomatic note.
>
> In response to the November 2 note, the American Embassy in Santo Domingo consulted with the Secretariat of Foreign Relations on November 25, 1981 for the purpose of emphasizing the importance of addressing the Dominican Republican's response to the lawsuit to the U.S. District Court rather than the Department of State.

(ER 149-50 CR 72, Item 3 therein)

Thus, the officials in the D.R. clearly were on notice that if they wished to claim jurisdictional immunity, they would have had promptly do so in the American courts. They made an informed decision not to do so.

Mr. Tonos, an international lawyer, while pleading ignorance in his declaration, was also a delegate to the United Nations in the U.S. for the D.R. (CR 72, Decl. of Miles Davidson) Consequently, there is little doubt that he was well aware of both U.S. and international law. Furthermore, just a few months before the service of process in the case, the D.R. had litigated in the U.S. Court of Appeals a suit served under the Foreign Sovereign Immunities Act. Yet Mr. Tonos and the same sovereign swore that they were not aware of the Foreign Sovereign Immunities Act. (See Arango v. Guzman Travel Advisors Corp. 621 F.2d 1371 (5th Cir. 1980).) Only after Petitioners' initial excuses for not responding were impeached by the Department of State did they change their position and create a new excuse. (ER

269 CR 71, Appendix C therein.)

Additionally, the sovereign grosses millions of dollars from various business activities in the U.S. It has filed numerous suits in Federal Court against United States citizens to enforce its rights. See e.g., Dominican Republic v. Roach, 280 F.2d 59 (D.C. 1960) (contract action); Dominican Republic v. Peguero, 225 F.Supp. 342 (S.D.N.Y. 1963) (action to enjoin). Thus, Petitioners were sophisticated U.S. litigants with competent U.S. counsel. See Meadows, 628 F.Supp. at 609. (App.68) Meadows, 817 F.2d at 522 (App.16-17)

On P.B. 8, Petitioners fail to state that the separate entity defense was not raised until the date of the hearing on the motion to set aside the default judgment (after one appeal to the Ninth Circuit where the petitioners were served

twice at every procedural step of the proceedings) in both courts just as if they had appeared. The Ninth Circuit and the District Court correctly ruled that it was not raised in a timely fashion, and even if timely raised it was only a defense against liability and not jurisdiction. See Meadows, 817 F.2d at 524 (App.26); Meadows, 628 F.Supp. at 608 (App. 63).

On P.B. 8, Petitioners claim that the Courts found jurisdiction exclusively based on non-related business and general contacts with the U.S. as a whole. This is not correct. The Court considered many factors in properly determining that the Court had jurisdiction both under the direct effect in the United States clause of § 1605(a)(2) and the due process clause of the Constitution.

To summarize, Petitioners are sophisticated business litigants familiar with the U.S. Courts and the FSIA who, against the advice and warning of the U.S. government, knowingly refused to respond to a suit for years who intentionally chose to appear and ask for equitable relief only after the key witnesses were either missing or dead, and records were destroyed or lost. This is a classic example of irreparable prejudice to the plaintiffs which would require the affirmance of the default even if a meritorious defense existed.

II. THE LOWER COURT DECISIONS IN THIS CASE ARE CONSISTENT WITH CASE PRECEDENT AND THERE IS THUS NO ISSUE REQUIRING RESOLUTION BY THE UNITED STATES SUPREME COURT.
(P.B. 10-14)

With respect to the introductory statements, Respondents submit that it is incorrect for Petitioners to suggest that

the instant case is inconsistent with any case precedent. Federal courts have wide discretion in applying jurisdictional concepts to various fact patterns. Indeed, in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 498 (1983), this Court recognized the broad discretion in reviewing the constitutional powers of Congress in enacting the jurisdictional provisions under the Foreign Sovereign Immunity Act.

Furthermore, contrary to Petitioner's arguments, the instant case is not inconsistent with relevant case precedent and does not involve unresolved recurrent issues that this Court should decide. (P.B. 10,14.)

The Ninth Circuit's refusal to set aside the default judgment was both consistent with existing law and amply supported by the U.S. State Department's

factual disclosures. Furthermore, the courts are in agreement that even if a delayed defense has some merit, if the delay has irreparably prejudiced the plaintiff, the default will not be set aside. As this Court correctly held in Verlinden, supra, at 488-89, the foreign state shall be liable in the same manner and to the same extent as a private individual under similar circumstances.

On P.B. 10, first paragraph, Petitioners appear to be claiming the writ should be issued because: (1) the decision is in conflict with a decision of another federal court of appeals on the same matter; (2) the refusal of the court to set aside the default judgment and allow the petitioners to raise a waivable issue of a separate entity conflicts with the decisions of this Court; and (3) the decisions raise significant issues under

the FSIA having a serious impact on foreign affairs.

Rule 17, which Respondents assume Petitioners rely on, is not mentioned. Furthermore, argument number (3) is not a ground for the issuance of a writ in any event. Moreover, as discussed below in further detail, argument (3) is not factually correct as the Department of State declined to file a statement of interest in this case although clearly aware of its details.

Petitioners' arguments (1) and (2) overlook the very material fact that the waivable defense of separate entity was not timely raised in any pleading or even in the motion to set aside the default judgment. It was raised only as an afterthought at the hearing on the motion. The District Court correctly agreed that it was too late to raise the

matter. This decision does not create a conflict among the courts, contrary to Petitioners' allegations. See e.g. Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929) (waivable defenses cannot be raised after a default judgment has been entered). Both the Ninth Circuit and District Courts therefore correctly found that, even if timely raised, the issue concerns liability, not jurisdiction. See Meadows, 628 F.Supp. at 608. (App.63) Even if the separate juridical entity claim was substantive and should have been considered, Petitioners have waived any rights to review of that issue by failing to argue the time issue on appeal, assuming it is not jurisdictional in nature.

III. THIS CASE WAS PROPERLY TRIED IN THE UNITED STATES DISTRICT COURT SINCE THE FSIA REQUIRES ONLY THAT A DEFENDANT HAVE CERTAIN MINIMUM CONTACTS WITH THE UNITED STATES AND NOT A PARTICULAR STATE BEFORE SUCH DEFENDANT MAY BE PROPERLY HALED INTO A UNITED STATES FEDERAL COURT AND THE DOMINICAN REPUBLIC HAD SUCH CONTACTS WITH THE UNITED STATES.

(P.B. 14-22)

Petitioners have attempted to split one basic non-issue,[1] into two twisted non-issues. Petitioners seriously mischaracterize the case law as conflicting among the circuits and distort the plain wording of the FSIA jurisdiction statute.[2]

1/ Whether the narrow state minimum due process contacts test under state (California only) long arm statute and diversity of citizenship jurisdiction are used to determine jurisdiction and minimum contacts for due process or is the broader test of contacts of the foreign sovereign with the United States as a whole used to determine jurisdiction under the FSIA.

2/ See I. A&B, pp. 14-15 and 20.

It is apparent that the petitioners were simply dissatisfied with the District Courts' consideration of the factors it weighed in determining that the U.S. courts did have jurisdiction of the parties and subject matter in this case. Rather than accepting the ruling made rightfully, and in the discretion of the court, Petitioners attempt to establish the court's compulsion to adhere to a jurisdictional formula more favorable to its position.

The Courts correctly determined that in deciding what factors to use for finding jurisdiction, the United States as a whole, not merely California, should be examined for purposes of determining minimum contacts and due process. This was properly determined <u>after</u> finding direct effect under §1605(a)(2) that only minimum contacts between the foreign

sovereign and the U.S. as a whole are required for purposes of jurisdiction and due process. See Meadows, 628 F.Supp. at 607 (App.57); Meadows, 817 F.2d at 523 (App.25).

At P.B. 15-20, Petitioners apparently take issue with some of the factors a federal court can use in exercising discretion to determine federal jurisdiction. However, Courts are entitled to weigh different factors in different cases. As this Court pointed out in Verlinden, supra, at p. 494-95, when discussing the differences under the "arising clause" and general federal statutory jurisdiction, Courts use "demands of reason [and] . . . the dictates of sound judicial policy . . ."

Petitioners' brief ignores the fact that, here, the Ninth Circuit and District Court found that the entire

factual matrix constituted jurisdiction under the direct effect in the U.S. clause 3/ of the FSIA and the due process clause of the Constitution. The Courts' analysis were clearly proper and consistent with the broad philosophy of Verlinden and related lower court precedent.

On P.B. 16, Petitioners argue that Courts should only examine "the single set of contacts giving rise to the cause of action." This is a new and novel argument Petitioners never made in the lower courts. Petitioners appear to argue that after direct affect is found, no examination of minimum contacts is necessary. To Respondents current knowledge there is no conflict among the circuits on this point.

3/ We note in passing that the petitioners carefully omit the phrase "in the United States" when discussing the direct effect clause.

However, even if this were the standard, both courts properly found direct effect in the U.S. Furthermore, if this were the case there would be no need for the plaintiffs to find maximum contacts on behalf of the Instituto as direct effect would be sufficient. In making this argument, Petitioners are undermining their own argument elsewhere.

Finally, Petitioners argument appears to be a state due process contacts test which, as will be indicated below, is not applicable here and is contrary to Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 303-06 (2nd Cir.1981), cert.den. 454 U.S. 1148 (1982).

On P.B. 17-20, Petitioners finally attempt to assert their basic complaint in the case, although they do not come out and state them: whether the narrow state diversity of citizenship/ due

process/ minimum contacts test with California only apply under the FSIA; or, whether courts may consider business contacts with the U.S. as a whole. Congress, this Court, and other relevant lower court precedents have consistently indicated that the narrower state long arm diversity of citizenship and minimum contacts test does not apply to the FSIA, and that contacts with the United States as a whole are considered in determining jurisdiction and minimum due process under the jurisdictional provisions of the FSIA. See Meadows, 817 F.2d 523 (App.25).

The jurisdictional provision of the FSIA are plainly worded to concern "the United States," not the states in which the federal court sits. 28 U.S.C. §1608 (App.92) Section 1603(c) of the Act defines the United States to include all

territories, including waters subject to U.S. jurisdiction. Further, the FSIA has its own international long arm statute, including service of process via diplomatic note through the U.S. Embassy in the foreign country.

Respondents did not serve the Petitioners under the State of California long arm statute. The Asahi case, upon which the petitioner so heavily relies in this regard, has absolutely no bearing on the factual pattern presented here. Asahi Metal Industry Co. Ltd., v. Superior Court of California, Solano County, etc., 94 L.ed. 2d 92 (1987). Asahi presents no federal jurisdiction issues. It is a state jurisdiction dispute involving a broken motorcycle part, originally brought in Superior Court. No federal diversity issue is raised whatsoever. Consequently, the Asahi case is totally

inopposite to the instant case involves a federal international long arm statute seeking jurisdiction over a foreign sovereign and using the U.S. Embassies abroad to serve a summons and complaint.

As this Court stated in Verlinden, supra, at p. 490, Congress was concerned that United States Courts might be turned into international courts of claims. Thus, Congress protected against this danger:

> "... by enacting substantive provisions requiring some form of substantive contact with the United States." (emphasis added).

(See also footnote 15.)

Nowhere can Petitioners point to any language in the FSIA or in the Verlinden case that the above quote should be rewritten to said:

> ". . . by enacting substantive provisions requiring some form of substantive contact with the Ninth Circuit or California."

However, this is exactly what Petitioners are arguing on P.B. 23-25. This position clearly conflicts with §1603(c) defining the "United States" under the Act.

To apply State of California due process contacts and the California state long arm statute in a FSIA case is frivolous. This Court, in Verlinden, supra, at p. 490 and at footnote 15, stated that Congress realized that the FSIA could turn the federal courts into small international claim courts for claims from anywhere in the world. Congress protected the federal courts from this danger, however, by "requiring some form of substantial contact with the U.S." (emphasis added). Id. Thus, this Court's decision in Verlinden, supra, likewise subscribes to the fact that the U.S. as a whole is used to determine the substantial contact of the foreign sovereign, and that suits

are not limited to state diversity concepts. (Further examples of direct effect in the United States or substantial contact with the "United States" are found at Id. 488, 490, 498 fn.23; Also see Texas Trading, supra, citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-8, reprinted in [1976] U.S. Code Cong. & Admin. News 6605, 6611-12.)

This Court also indicated in Verlinden, supra, 492, that the diversity of citizenship jurisdictional clause of the U.S. Constitution was too narrow to cover the FSIA jurisdictional sections in all respects. On pages 493, at footnote 19, and on page 496, this Court indicated that Congress relied on its broader powers to regulate commerce with foreign nations and to define offenses against the Law of Nations in enacting the jurisdictional FSIA provisions. The Petition-

ers' citations to diversity of citizenship cases to support their arguments are clearly inappropriate and flies in the face of the plain wording of the FSIA, its international long arm statute, Congressional intent, and the precedents of this Court. Likewise, it is equally clear that the circuits are not in conflict on this point. See e.g., Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir.), which stated:

> "'minimum contacts' with a particular ... state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries.."

(Id., quoting Johnson v. Creative Arts & Wool Masters, Inc., 742 F.2d 947, 950 (CA 1 1984); See also Mariash v. Morrill, 496 F.2d 1138, 1143 (CA 2 1974); Lesco Data

Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340-43 (CA 2 1972); See Texas Trading, supra, 647 F.2d at 314; Chicago Bridge & Iron Company v. Islamic Republic of Iran, 506 F.Supp. 981, 988 (N.D. Ill. 1980) citing East Europe Domestic International Sales Corp. v. Terra, 467 F.Supp. 383, 387 (S.D.N.Y. 1979).)

Petitioners have mysteriously omitted noting on P.B. 20 and 24 that the certiorari was denied in Texas Trading, supra. This Court indicated in Verlinden at footnotes 2 and 23, that the Verlinden case and Texas Trading involved the exact same commercial transaction factual matrix. Verlinden was reversed by this Court for declining jurisdiction on constitutional grounds and Texas Trading was not accepted for review even though, as in the instant case, jurisdiction was

found under the direct effect in the U.S. clause of the FSIA. Although a denying of a petition only means that none or not enough justices voted for review, footnote 23 can be read to imply that Texas Trading was decided correctly and/or the issues involved did not warrant review by this Court. In any event, this Court declined review in Texas Trading, which raised some of the same issues as in the instant petition. This Court, for the same reasons, should deny the petition in this case.

IV. THE ISSUE OF THE INSTITUTO'S SO-CALLED JURIDICAL SEPARATENESS FROM THE DOMINICAN REPUBLIC WAS NOT TIMELY RAISED AND RECOGNIZING SUCH A DEFENSE AT THIS LATE POINT IN THE JUDICIAL PROCESS WOULD BE EXTREMELY PREJUDICIAL AND UNJUST.

The petitioners have also failed to disclose that the issue of separate juridical entity was not raised until the date of the hearing on the motion for

default, close to nine years after the transaction took place and almost five years after a responsive pleading was due, and when plaintiff Meadows, the person who negotiated with the defendant with Dominican officials was dying of cancer and mentally incompetent. Also, Dr. Mena the other major principal to the transaction cannot be found. Consequently, due to the Petitioners unreasonable delay, most of the principals who could competently testify on the Petitioner's assertion do not remain to provide any facts or evidence. Even the Petitioners own declarations are made by people without personal knowledge. Thus, the plaintiffs were irrevocably prejudiced in presenting a response to this untimely substantive and extremely technical defense. The denial on the

basis of timeliness by the Court at the hearing was clearly correct.

The current Petitioner is repleat with legal inaccuracies. For example, on P.B. 28-29 the petitioners assert:

> "This Court stated in Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485-86, n.5 (1983) that "both statutory subject-matter jurisdiction (otherwise known as 'competence') and personal jurisdiction turn on application of the substantive provisions of the Act." (emphasis added).
>
> Thus, in order to make a finding of jurisdiction under the FSIA, a court must look both at substantive law and the facts of the underlying cause of action presented to it. The Ninth Circuit's refusal to consider an issue of "substantive" law and its claim thereby to have avoided a jurisdictional decision, is at odds with this Court's interpretation of the FSIA in Verlinden.

This is absolutely incorrect. Verlinden, supra, does not say that a court, in order to find jurisdiction must look at general substantive law. This

Court clearly stated that a Court should look at the substantive provisions of the "Act" (FSIA) to find jurisdiction, not the substantive provision of the law in general. Petitioners thus cite Verlinden, supra, for a proposition for which it clearly does not stand. This is a good example of the tortured reasoning to which the petitioner must resort in presenting its arguments. The lower court's interpretation of "the Act" is clearly correct in determining the direct effect in the U.S. for FSIA jurisdiction. Also, the application of the Act by the Court here is consistent with Texas Trading, supra, in which this Court denied review where jurisdiction was determined under the direct effect in the the U.S. clause of the FSIA.

On P.B. 30, the petitioner asserts that in this issue one must go beyond the

law into the facts via affidavit. First, as indicated above and below, petitioners waited until Meadows was incompetent and then dead. Records are now unavailable and other witnesses are dead or missing. The plaintiffs thus cannot obtain previously available crucial evidence and are irreparably prejudiced. Second, the petitioners have repeatedly presented dubious interpretations of material facts leaving the remaining plaintiff without hope of developing more evidence in regards to the court's jurisdiction over the petitioner. So, after stonewalling for 11 years with key individuals in the Dominican Republic missing, records gone, witnesses already dead or missing, and the principal actor, Mr. Meadows dead, to allow this issue to be raised would prejudice the plaintiff and cannot be raised even if it had merit.

The cases cited by the petitioners to support their argument that juridical separateness is pertinent to jurisdiction misstates the issue. Attachment of property after a federal court has found jurisdiction and entered a judgment has nothing to do with original jurisdiction under the FSIA. 4/ Even the House Report treats this matter under attachment of property in the post judgment collection provisions of the FSIA and is solely a post judgment legal liability matter. See H.Rept. No. 94-147, p. 28 (a) post judgment execution against property of a foreign sovereign. The House Report also indicated that the old quasi in rem cases such as the ones cited on p. 30 are repealed as attachment for jurisdiction

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4. The Plaintiff's right to attach the Petitioner's property is not before this Court but on appeal in the Ninth Circuit.

would no longer be necessary or permitted. See H.Rept. No. 94-1487, p.8.

The inference on P.B. 33 that the affirmance of this case would adversely affect foreign relations is untrue. In the Jackson case, cited on P.B. 36-37, the Secretary of State filed an affidavit based on conversations with Chairman Deng of China and said the default was impeding relations. The record in this case is that the Department of State provided and offered proof that the defendants were not telling the Court the truth. The State Department filed no Statement of interest even though they are clearly aware of the case and could have. Consequently, there is no conflict between the circuits as stated on p. 33. There are no foreign policy implications except that that the Dominican Republic has refused to pay this U.S. creditor.

Indeed, the record shows that many other creditors have not been paid. This Court should not come to the defense of such a litigant.

Factors other than fairness and equitable consideration that compel the preclusion of the juridical separateness defense. Namely, in raising this defense, the D.R. does not bring to issue the core question -- whether or not the funds in question are owed to George Meadows. The petitioners actually have not demonstrated any defense on the merits. In raising this defense Petitioners do not deny their debt to the plaintiff - they simply raise a technical defense to payment.

Furthermore, in raising the juridical separateness defense, D.R. refused to bring forth facts in its sole possession regarding the loan negotiations and loan

closing. Such facts would bring to the bar information concerning whether (1) other agencies of the D.R. which are clearly not juridically separate from the D.R. were involved and (2) whether the Instituto or its agents had additional contacts with the United States regarding the loan transactions. Thus, even facts critical to the validity of the juridical separateness defense itself are withheld by the Dominican Republic.

The record shows that the offered declarations were not from anyone who had any personal knowledge. For instance, several were from a person whose declaration acknowledged that she had not finished her legal education when the factual transaction took place or even when the summons and complaint were served. She joined the government in 1982. No certified or verified records

were offered. It was as if people were summoned from Pennsylvania Avenue, N.W. in 1985, having no personal knowledge, to comment on a transaction and service of a summons and complaint occurring in the Truman Administration.

Even assuming arguendo that the Petitioners had a meritorious defense, the case law is uniform among the Circuits that if a party unreasonably delays in asserting a meritorious defense and the delay irreparably prejudices the plaintiff, a default judgment will not be set aside.

The standard for determining prejudice to the opposing party is whether his ability to pursue his claim will be hindered." (Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The nature of the prejudice in this case is threefold.

First, Charles Meadows was hospitalized in July of 1985 diagnosed as dying of cancer. (ER 561-65 CR 68.) His condition then made him unable to act as a witness or even to review the defendant's moving papers and to file a responsive affidavit. Mr. Meadows is now deceased. Charles Meadows was the lead plaintiff in this case and the person who primarily dealt with the defendants in the circumstances leading to the suit. He is the only plaintiff witness familiar with the facts surrounding the creation of the contact upon which the suit is based on the representations involving a separate entity. Even the defendants have noted that this is the "crucial issue" of the case. (ER 201 CR 71 at 29 n.17.) If defendants are granted relief from default, they will be able to make whatever factual assertions they wish at

trial knowing full well that Meadows is no longer present to dispute their accuracy. Without Meadows the plaintiffs have lost their key witness.

Second, other crucial witnesses to the events upon which this case is based have died, disappeared or become unavailable. One potential witness, Pete Culbertson, who was involved in the loan negotiation as President of Citibank Santo Domingo, Dominican Republic, died on July 6, 1983. (CR 72 Declaration of J.P. McAward, Jr., at para.3.) At least two other potential witnesses cannot be located. (CR 72, Declaration of George Harris at para. 4; Declaration of J.P. McAward, Jr., at para.4.) Likewise, Dr. Mena, the former Secretary of State of the defendant Dominican Republic and General Administrator of the defendant Instituto who played a primary role in

the circumstances leading to this suit, also appears to be unavailable. Dr. Mena is the only other competent witness, besides Charles Meadows, qualified to testify in the "crucial" creation of the contact issue. The defendants admitted Mena's importance at one point (CR 68, Appendix H, therein), but nonetheless have conspicuously failed to offer his declaration in support of their "meritorious defense." Counsel for the petitioner admitted in the presence of Mr. Meadows' brother (John Meadows) and his attorney that the petitioners could not locate Dr. Mena. In fact, no person who has personal knowledge or was in any way directly connected with the transaction has ever filed an affidavit on behalf of the Petitioners.

Third, the defendants' intentional refusal to respond to the plaintiffs'

suit required the plaintiffs to expend a considerable amount of time in terms of literally years, money and energy to obtain a default judgment. This considerable expense is the usual desired result by a defendant adapting a strategy of delay. The defendants now ask that the Court strip the plaintiffs of their hard earned judgment and make them start again from scratch, fully aware that their intentional delay has fatally hindered the plaintiffs' ability to pursue their claims. If the Court grants the requested relief, the defendants will obtain all of the benefits of a strategy of non-response without detriment to themselves but with great expense and prejudice to the plaintiff. Finally, all of the missing witnesses combined with the Petitioners' previously referenced habit of filing declarations of

questionable accuracy raises a legitimate question that if the default was set aside whether an accurate presentation of the case to a trier of fact or remand is possible or even likely.

There are no special policy decisions on entering defaults against sovereigns as petitioners assert. Indeed, the FSIA and Committee Report clearly provide for defaults, and outline special procedures. The lower courts decided that these procedures were complied with, sometimes several times over, because the mailing receipts were intentionally withheld. See H.Rept. No. 94-1487, p.23-24. The State Department filed no Statement of interest here. Contrary to the petitioner's assertions, no pressing foreign policy considerations exist warranting relief from the default.

V. THE RECOGNITION BY THE COURT OF AN UNTIMELY RAISED DEFENSE WOULD REWARD THE PETITIONER FOR HIS MISUSE OF THE JUDICIAL SYSTEM.

To grant the petition of this sophisticated litigant, and experienced business conglomerate operating in the U.S., on any basis and reverse the Ninth Circuit's decision would to quote this Court "be subversive of orderly procedure and make for harmful delay and confusion." (Commercial Casualty Insurance Co. v. Consolidated Stone Co., 278 U.S. 177 (1929).) The defendants are seeking to argue questions which they purposely declined to involve themselves in a timely manner. They carefully filed a "special appearance" in this case. They have failed to post a bond on appeal. They have vigorously contested collection and have asserted that the judgment is uncollectible under the FSIA. If the

current default judgment is set aside it would reward a litigant who has for eleven years failed to play by the rules and irreparably prejudiced a litigant who has persistently operated within the framework of the law. Justice requires that the current judgment be maintained and the petition for certiorari be denied.

CONCLUSION

The petition should be dismissed as not presenting issues appropriate for review.

Respectfully submitted,

_____

E.O.C. ORD
Attorney for Respondents

Dated: October _____, 1987

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